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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ROBERT DAVID UNION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No._____

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Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Petitioner, Robert David Union, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in this case on May 11th, 1981.

QUESTION PRESENTED

Whether the Circuit Court erred in affirming a District Court decision based on findings of fact and law on issues of arrest and confession?

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OPINIONS BELOW

The Memorandum Order and Judgment of the Untied States District Court for the District of Maryland entered on April 17th, 1980, and June 18th, 1980, unreported No. 80-0051 (D. Md., June 18th, 1980) are set forth in the Appendix.

The Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit, unpublished, May 11th, 1981, is set for in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit, for which review is sought, was entered on May 11th, 1981 and this petition is filed within sixty (60) days of that date, in accordance with Rule 20.2 of this Court.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent text of United States

Constitution, Amendments IV and V; 21 U.S.C. 841 (a)(1); 18 U.S.C. 2, are set forth in the Appendix.

STATEMENT OF THE CASE

The Petitioner, Robert David Union, on February 13th, 1980, was indicted by a Federal Grand Jury in the District of Maryland and charged under Criminal No. HM-80-0051 with unlawful distribution of heroin under 21 U.S.C. 841 (a)(1) and aiding and abetting in violation of 18 U.S.C. 2.

On March 11th, 1980, Union filed Motions to Suppress and Exclude Evidence and Confession. A hearing was held before Judge Murray on the Motion to Suppress and Exclude Confession, while at the same time an order was entered dismissing the Motion to Suppress and Exclude Evidence. On April 17th, 1980, the Court issued a Memorandum and Order granting in part and denying in part Union's Motion to Suppress and Exclude Confession (A. 1-21).

On April 21st, 1980, trial was held before the Court on an agreed Statement of

Facts. Union was found guilty and subsequently sentenced on June 18th, 1980, to four (4) years imprisonment with an additional special parole of five (5) years.

A timely Notice of Appeal was filed by Union on June 25th, 1980, to the Circuit Court. Jurisdiction was conferred by 28 U.S.C. 1291. Briefs were filed and the case was argued on April 19, 1981 before the panel of Judges Bryan, Russell, and Hall. On May 11, 1981, the Circuit Court filed an unpublished one page per curium opinion which concluded that "we perceive no insufficiency of proof or error of law at trial, and accordingly affirm the conviction of Union." (A.22-25).

REASONS FOR GRANTING THE WRIT

I. THE APPELLANT'S ARREST WAS ILLEGAL AND IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Appellant, Robert David Union, was arrested on March 14, 1979, by officers of the Baltimore City Police Department. The

arrest was made without a warrant and therefore, pursuant to 21 U.S.C. 878, had to be based on "probable cause to believe that the person to be arrested has committed or is committing a felony."

The information leading to Union's arrest was based entirely on the hearsay declarations of the third parties, and must, therefore, comply with the two-prong test of Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969).

The informant's veracity must be established by demonstrating that he is credible or his information reliable and the informant's basis of knowledge must be evident from the record.

Information concerning Union was obtained from two unnamed informants and from Max Blumberg. The trial court correctly reasoned that the information from the first informant could not be considered in determining probable cause since there was no indication as to the basis of his knowledge. With respect to the second

informant, the trial court erroneously concluded that his information met both prongs of the test since the information was based on personal observation and had led to the arrest of Max Blumberg and the seizure of heroin in Blumberg's apartment.

The record, however, contains no evidence of the second informant's veracity or basis of knowledge concerning Union. Assuming arguendo that the second informant's credibility and basis of knowledge may be inferred from the fact that his information was contained in the Affidavit for the search and seizure warrant of Max Blumberg's apartment, the Affidavit and warrant made no mention of Robert Union; therefore, it is erroneous to infer from the Affidavit that this second informant's basis of knowledge has been established with regard to Union as well.

Furthermore, the Maryland District Court Judge who issued the search and seizure warrant for Blumberg's apartment may have disregarded

the information from the second informant altogether and determined that probable cause existed based on other independent information contained in the Affidavit.

The trial court further erred in reasoning that the first informant's tip could be considered as strong corrobation of the second informant's information about Union's involvement. Since the first informant failed to pass the two-prong test, his information must be considered unreliable for all purposes. When Spinelli speaks of corrobation of an informant's tip, the corrobation contemplated is clearly that of a police officer whose credibility is established by oath and whose basis of knowledge is personal observation. An informant whose information is admittedly too unreliable to be used cannot then corroborate a second informant's tip.

Therefore, the information obtained from the first and second informants and from "other police sources" cannot be used to

establish probable cause for Union's arrest. The only remaining information concerning Union was obtained from Max Blumberg, who stated after his own arrest that he expected Union to come by for money owed him on a drug transaction and that he suspected that Union might be bringing more drugs with him.

Blumberg's information fails both the veracity prong and the basis of knowledge prong of the Aguilar - Spinelli test. The trial court concluded that Blumberg's information was made credible by the fact that it was consistent with the other two informants' tips and by the fact that Union called four times to be sure it was safe to come over. Again, the trial court relies on the buttressing technique of corroboration contained in the Spinelli explication of Aguilar. As previously stated, the information from the two unidentified informants cannot be used as corroboration, since both informants failed the two-prong test. However, the telephone calls from Union are the type of corroboration contemplated

by Spinelli and must be considered.

The trial court ruled that Union's calls indicated that his trip was not for an innocent purpose and that these calls, in conjunction with the information from the unnamed informants, rendered Blumberg a credible informant for purposes of Aguilar and Spinelli. While it is a factual determination as to whether Union's behavior alone would be sufficient corroboration to establish Blumberg's credibility, it is a determination that the trial court chose not to make.

The independent corroboration of the agents showed that Union merely telephoned Blumberg four times to ascertain if it was safe to come over. Although Union's behavior may be considered suspicious, it is not direct corroboration of Blumberg's information. Union testified that he heard banging coming from Blumberg's apartment and it is plausible that Union innocently feared the unknown source of

the banging and therefore called Blumberg to make sure it was safe to come over. Both conclusions are inferences that can be drawn from Union's behavior and neither is as strong as direct corroboration, such as Blumberg handing money over to Union, which would better serve to establish Blumberg's credibility. The mere inference that Union was behaving suspiciously is insufficient to elevate Blumberg's credibility to the required level of a tip that would pass Aguilar's test without the need for corroboration. Spinelli, 393 U.S. at 415-416.

Further, Blumberg's basis of knowledge has not been established from the record and has merely been inferred by the trial court. Blumberg's story was not given in sufficient detail to indicate first hand knowledge and the corroboration of Union's behavior cannot be used to cure a defective basis of knowledge. Therefore, Blumberg's information fails both the veracity prong and the basis of knowledge prong of the

Aguilar - Spinelli test.

For the above mentioned reasons, the information of the two unidentified informants, the "other police sources" and Max Blumberg cannot be considered in determining whether there was probable cause to arrest Union. See generally Moylan, Hearsay and Probable Cause: An Aguilar and Spinelli Primer, 25 Mercer L. Rev. 741 (1974). The only information that can be considered is the first hand observations of the agents that Union was anxious to be sure that all was safe before he came over. This information might possibly be sufficient to raise a suspicion about Union but is clearly insufficient to warrant a prudent man in believing he had committed or was committing an offense. See Beck v. Ohio, 379 U.S. 89 (1964).

II. THE STATEMENTS MADE BY THE APPELLANT SUBSEQUENT TO HIS ILLEGAL ARREST WERE TAINTED BY THE ILLEGAL ARREST AND SHOULD BE SUPPRESSED UNDER THE FOURTH AND FIFTH AMENDMENTS.

In Wong Sun v. United States, 371 U.S. 471 (1963), the Supreme Court recognized that the Fourth Amendment exclusionary rule applies to statements obtained following an illegal arrest. The Court held that a statement made by a defendant following his illegal arrest will be suppressed unless the statement results from an "intervening independent act of free will" and was "sufficiently an act of free will to purge the primary taint of the unlawful invasion," 371 U.S. at 486. Conversely, the Court ruled that the statment will be admitted if the connection between the unlawful arrest and the statement "had become so attenuated as to dissipate the taint", 371 U.S. at 491.

In Brown v. Illinois, 422 U.S. 590 (1975), the Supreme Court addressed a situation where a defendant was arrested unlawfully but made statements after he was advised of his rights under Miranda v. Arizona, 384 U.S. 436 (1966). The Court reasoned that even if the statements were

found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remained, that "Wong Sun required not merely that the statements meet the Fifth Amendment standard of voluntariness but that it be sufficiently an act of free will to purge the primary taint", 422 U.S. at 602.

In Brown, the Court suppressed all statements made by the defendant notwithstanding the fact that they were made voluntarily and in compliance with Miranda. The Court reasoned that Brown's first statement was made less than two hours after his illegal arrest and that there was no intervening event of significance whatsoever. In addition, the Court found the illegal conduct of the arresting officers to be purposeful.

In the instant case, Union made his statements less than two hours after arrest and without any intervening circumstances to purge the taint of his illegal arrest. Although the illegal conduct of the officers

in the instant case does not appear to be purposeful, the close temporal proximity of the illegal arrest and statement and the lack of intervening circumstances demonstrate that the case is factually analogous to Brown v. Illinois and the situation of defendant Toy in Wong Sun v. United States and the statements made by Union must therefore be suppressed.

III. THE STATEMENTS MADE BY THE APPELLANT WERE OBTAINED IN VIOLATION OF HIS FIFTH AMENDMENT RIGHT AGAINST COMPELLED SELF INCRIMINATION AND MUST THEREFORE BE SUPPRESSED.

The trial court ruled that Union's original statement given after his arrest was fatally defective because he was given an incomplete instruction as to his Miranda warnings. Miranda v. Arizona, supra (1966). The trial court held that Union was not adequately informed of his rights until he was provided the Explanation of Rights form at police headquarters and the form was reviewed by and with him.

In so ruling, the court placed primary emphasis on the mechanical and technical adequacy of the Miranda warnings themselves, and failed to address the effect of unlawful police interrogation, including Union's statements, and his giving of consent to the police for a search of his rooms, on his subsequent decision to sign the written waiver of rights form. The court ruled that at the time Union signed the waiver form he had had a chance to calm down from his extremely nervous emotional state at the time of his arrest, and to evaluate his position. The court applied the test for voluntariness set out in Schneckloth v. Bustamonte, 412 U.S. 218 (1973), and determined that Union's age, advanced education, the subsequent adequate advisement of rights, and the degree of coercive pressure by the police, all indicated that he had voluntarily waived his rights per Miranda.

The court did not properly consider that at the time Union signed his waiver of rights,

he had already given damaging statements; he had been told that he was being charged with possession of all the heroin and was shown charge papers to reinforce the effect; and that the police had already recovered other evidence for which he was told that he would be charged as well.

In Brown v. Illinois, supra, the Supreme Court was faced with an analogous situation. Subsequent to an illegal arrest, Brown made an incriminating statement. Several hours later, he made another statement. The Court suppressed Brown's first statement as inadmissable fruit of an illegal arrest, and suppressed the second statement because it was a result or byproduct of the first. The two statements were intertwined. The Court reasoned that "...the fact that Brown had made one statement, believed by him to be admissable, and his cooperation with the arresting and interrogating officers in the search for Claggett, with his anticipation of leniency, bolstered the pressures for him

to give the second, or at least vitiated any incentive on his part to avoid self-incrimination. " 422 U.S. at 603, footnote 12.

In this case, Union's testimony clearly indicates that he signed the waiver form because he had already given information and cooperated with the police in an effort to gain advantage and leniency. Any perceived favorable position gained by the earlier efforts would be lost by failure to sign the waiver form and continue the cooperation with the police. From Union's arrest through his illegal statement and cooperation to the time of the signing of the Miranda form involved a period of approximately one and a quarter hours. The entire process represented a continuous transaction with the police and with no time lapse or breathing space or intervening event to attenuate the ongoing taint. Union, of course, had no way of knowing that the original statement would eventually be disallowed.

In United States v. Shelly, 430 F.2d 215 (2d Cir. 1970), that Court of Appeals noted "...the simple, likely conclusion is that when a suspect, in the rapid sequence of events present here, has already admitted his guilt, he will be far less likely to give intelligent consideration to later requests to waive his right to remain silent and to have counsel present, since he will regard them as meaningless." 430 F.2d at 218.

Union was in a position of no turning back, even though what had occurred to the point of the written Miranda warnings was illegal and subsequently inadmissable, but not known to him as such, and thus, the second statement surely arose from the first.

CONCLUSION

Petitioner urges review of the judgment of the circuit court which affirmed the district court. If allowed to stand,

the decisions below will result in a lessening of the Constitutional guarantees of the Fourth and Fifth Amendments.

Petitioner respectfully prays this Court to grant a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review and ultimately to reverse the judgment entered below.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

v.

ROBERT DAVID UNION

Criminal No. HM80-00051(R)

MEMORANDUM AND ORDER

The defendant, Robert David Union, has been charged with unlawful distribution of heroin. He has moved to suppress certain statements he made to law enforcement officers after his arrest, on the grounds that the arrest was illegal, that he was not adequately advised of his constitutional rights as required by Miranda v. Arizona, 384 U.S. 436 (1966), and that his subsequent written waiver of those rights was not knowingly, voluntarily and intelligently made. The court held a hearing on the motion on March 21, 1980, at which time the

court postponed decision of the matter until the parties could review the transcript and file additional memoranda. Having carefully studied both those memoranda and the transcript, the court has concluded that Mr. Union's arrest was legal and that his written waiver of his Miranda rights was voluntary, but that the Miranda warnings given to him at the time of his arrest were fatally defective. As a result, any statements Mr. Union made to law enforcement officers between the time of his arrest and the time he signed the waiver form will not be admissible at trial as evidence against him.

Union was arrested on March 14th, 1979. That evening, agents of the Federal Drug Enforcement Agency and members of the Baltimore City Police Department, acting pursuant to a warrant, searched the apartment of Max Blumberg in Baltimore and seized a quantity of heroin, approximately four thousand dollars in cash, and various drug-related

paraphernalia. While the search was in progress, Blumberg's telephone rang. One of the police detectives answered and the male caller asked to speak to Blumberg, who had been in his apartment since the search began and who was then under arrest. When the detective said Blumberg was in the shower, the caller hung up. The same person then called a second time, again spoke with one of the detectives, asked for Blumberg, and refused the detective's invitation to come to the apartment without first speaking to Blumberg. After the second call, Blumberg advised the police that the caller was probably Robert Union, that Blumberg had been expecting Union to come by that evening to pick up some money Blumberg owed Union for heroin, and that Union would possibly be bringing more heroin to give to Blumberg. The officers then persuaded Blumberg to cooperate should the man call again, and to advise the caller that all was clear for him to come to the apartment.

The phone did ring a third time, and Blumberg told Union to come over. Blumberg then gave the police a description of Union: that he was a white male, about thirty years old, 5'7" tall, weighing about 140 pounds, clean-shaven. Three detectives then took up hidden positions in the lobby of Blumberg's apartment building, while two federal agents remained with Blumberg. Approximately fifteen minutes later, at about 11:00 p.m., Blumberg's phone rang again. Union was calling from the lobby, again to assure himself that nothing was amiss in Blumberg's apartment.

When Union walked from the phone booth into the center of the lobby, the waiting officers arrested him, their guns drawn. It was then approximately 11:10 p.m. Union testified that the police did not identify themselves, and that he thought he was being robbed or killed. Union was then taken to a room behind the switchboard in the lobby and strip-searched. He testified that during this time he was "in a complete

state of shock" and unable to breathe or swallow. (Tr. at 86-87.) Although he remembers one detective, Detective Smoot of the Baltimore City Police, showing Union his badge, Union does not remember anyone advising him of his rights during the period immediately after his arrest. A search of Union's wallet revealed a folded piece of paper containing a small amount of white powder.

Detective Smoot testified that he and the other officers identified themselves as they arrested Union. Smoot advised the defendant of his rights as follows:

> I told Mr. Union that he had the right to remain silent, that anything he said could be used against him in a court of law. If he could not afford an attorney, one would be appointed for him.
>
> . . .
>
> Those are the rights I advised him of, because that is the only ones I had available at the time. I had none written down. It was all verbally. (Tr. at 53)

Smoot also testified that the defendant was "highly nervous and shaky" while he was being arrested and searched. The defendant

appeared unable to understand who the policemen were or what was going on. (Tr. at 54.) He was so shaken that he could not even remove his shirt. At some point during this time, the police searched Union's car, whose keys Union had given them.

After the defendant had been held at the apartment building about 35 minutes, he was taken to the Baltimore City Police Headquarters. Smoot testified that by that time, approximately 11:45 p.m., the defendant was still shaky but had calmed down considerably.

At the police station, Union was handcuffed to a chair in a room where two police officers were sitting. Agent Keller, one of the two federal agents who had searched Blumberg's apartment, entered the room and questioned Union briefly about his willingness to cooperate. According to Union, Keller asked him to identify people whose names were on a list, and Union gave physical descriptions as well as accounts of people's

involvement with drugs. At 12:03 a.m. on March 15, Keller obtained Union's signature on a form consenting a search of the defendant's motel room. Keller then asked another agent to take a further statement from Union. At 12:25 a.m., the defendant signed a written form acknowledging that he understood his Miranda rights and voluntarily waived them. He thereafter made additional statements to the authorities.

In light of all the testimony presented at the hearing, it is clear that Union's arrest was legal. The arrest was made pursuant to 21 U.S.C. Section 878, which authorizes arrests without a warrant in federal drug cases if there is "probable cause to believe that the person to be arrested has committed or is committing a felony." The court is satisfied that Union's arrest was based on probable cause. Prior to March 14, 1979, the police had learned from two different informants that Union was a member of a group trafficking

heroin in the Baltimore area, and that Union and Blumberg were associates in drug dealing. The first informant, who provided information on Union in November or December of 1978, had previously given police information which led to five arrests as well as the seizure of 500 pounds of marijuana and two vehicles. The second informant had communicated with agents on March 7, 1979, just one week before Union was arrested. The second informant provided the information that there was heroin in Blumberg's apartment, and that Blumberg and Union were "some times partners" in heroin distribution. That information formed at least part of the basis for the agents' affidavit in connection with the warrant to search Blumberg's apartment.

The information of the first informant clearly meets the first prong of the two-part test set out in Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969): earlier tips

from the same person had led to successful arrests and seizures. It is not clear whether the information comports with the second prong of the test, because there is no indication what formed the basis of the informant's knowledge. It could as easily have been vague rumor as personal observation. See Spinelli, supra, 393 U.S. at 416. However, the information of the second informant passed both prongs of the test. His knowledge was based on his own observation of the heroin in Blumberg's apartment, (Tr. at 8;) and at the time of Union's arrest, the informant's tip had already led to Blumberg's arrest and the seizure of contraband. Thus even if the first informant's tip could not in itself amount to probable cause, it was at least strong corroboration for the second informant's information about Union's involvement. There is also evidence the reports on Union were further corroborated by "other police sources," although the record does not provide any details. (Tr. at 7.)

One more informant told the police about Union's involvement with drugs: Max Blumberg. He stated shortly after his own arrest that he expected Union to come by for money owed him on a drug transaction. Blumberg also suspected the defendant might be bringing more drugs with him. It is clear that Blumberg and Union had arranged the visit before the officers' arrival, and that the basis of Blumberg's information was therefore personal knowledge. As the defendant points out, there is no evidence Blumberg had previously provided any reliable tips that would increase the credibility of his information about Union. Furthermore, having just been caught "redhanded" in possession of heroin and large amounts of cash, Blumberg might have been inclined to say whatever he thought might cast suspicion on Union and force him to share the consequences. Nevertheless, Blumberg's statements were made reasonably credible by the fact that they were consistent with the other two informants' tips, and by the

fact that Union called four times to be sure it was safe for him to come over. If his visit had an innocent purpose, it is unlikely he would go to such pains to protect himself. Even when the informant's personal veracity is in doubt, such corroborating information may be sufficient to render the informant's tip credible for purposes of the Aguilar-Spinelli test. See United States v. Harris, 403 U.S. 573, 579-80 (1971); United States v. Canieso, 470 F.2d (2d Cir. 1974); United States v. Archuleta, 446 F.2d 518 (9th Cir. 1971); Moylan, Hearsay and Probable Cause: An Aguilar and Spinelli Primer, 25 MERCER L. REV. 741 (1974). In the court's view, the corroborating information was sufficient in this case to make Blumberg's tip reliable.

In sum, just prior to Union's arrest, the officers knew from two previous informants that Union was dealing in drugs and associated with Blumberg in drug trafficking. They had reason to believe that Union had brought

Blumberg heroin for which he was coming to collect payment, and that he might be bringing more heroin as well. They knew from first-hand observation that Union was anxious to be sure all was safe before he came over. The court therefore concludes that when Union was arrested, "the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the (defendant) had committed or was committing an offense." Beck v. Ohio, 379 U.S. 89 (1964).

Although Union's arrest was legal, he was not adequately informed of his rights in accordance with Miranda v. Arizona, supra, until approximately an hour and a quarter after the arrest. Detective Smoot advised Union that he had the right to remain silent, that anything he did say could be used against him, and that an attorney would be appointed for him if he could not afford one.

The most significant omission is any advice as to the defendant's right to the presence of counsel. Several cases have considered the adequacy of Miranda warnings which tell the defendant of his right to counsel but fail to clarify that the defendant may demand an attorney's presence before any questioning begins. See, e.g., Wright v. North Carolina, 483 F. 2d 405 (4th Cir. 1973), cert. denied, 415 U.S. 936 (1974); United States v. Fox, 403 F. 2d 97 (2d Cir. 1968); Atwell v. United States, 398 F 2d 507 (5th Cir. 1968); Lathers v. United States, 396 F. 2d 524 (5th Cir. 1968). The court in each of those cases concluded that the person arrested had to be made aware he had a right to have counsel present either before any custodial questioning began, or at the very least before the person arrested "uttered a syllable." It follows that Miranda warnings are necessarily inadequate when the right to counsel has been omitted altogether.

The Supreme Court has recently reiterated that the right to have counsel present at any custodial interrogation is indispensable to protecting a defendant's fifth amendment rights. Fare v. Michael C., ___ U.S. ____, 47 U.S.L.W. 4771 (June 20, 1979). Miranda does not require adherence to a ritualistic formula, as long as the substance of the rights is communicated to the defendant. United States v. Vanterpool, 394 F.2d 697 (2d Cir. 1968). But the court has heard no evidence that Union was told he had a right to counsel at all until he signed the waiver-of-rights form at approximately 12:25 a.m. on March 15th. Agent Keller testified that when he saw Union at the police station after the arrest, Keller asked him immediately if he wanted to call a lawyer. Even assuming that to be true -- and Union maintains he asked to use the phone but Keller denied the request -- it does not amount to informing Union of his absolute right to make the call. Keller testified that he did

not specifically advise Union of his rights, because the Baltimore Police officers had told Keller they had already done so. (Tr. at 22).

The adequacy of the Miranda warnings is further diminished because of Union's emotional state at the time of his arrest. According to both Union and Detective Smoot, the defendant was so upset that he could not comprehend what was going on around him. Although Union's fright should not be deemed sufficient in itself to invalidate the warnings, the officers would have been well advised under the circumstance to re-read the rights, prior to any interrogation, when the defendant had calmed down and when a more complete, written list of rights was available.

Although the version of the Miranda rights Detective Smoot gave Union thus was clearly inadequate, the police officers remedied the problem when Detecter Berger of the Baltimore City Police gave the defendant an "Explanation of Rights" form and went over

it with him at the police station. Detective Berger testified that he went over each right on the written form, asked Union if he understood each, offered to answer any question Union might have, and told him to initial each right if he understood it. The form, introduced at the hearing as Government's Exhibit 2, bears the initials "RU" in the defendant's handwriting next to each right.

At the bottom of the rights form, Union signed a statement that he was willing to answer questions and did not want an attorney at that time. He contends that the waiver was not voluntary, and that any statements he made after signing the form should therefore be excluded from his trial. He argues that when judged by the "totality of the circumstances" test, neither the waiver nor any subsequent confession was voluntary. The court cannot agree.

The Supreme Court set out the test for voluntariness very clearly in Schneckloth v. Bustamonte, 412 U.S. 218 (1973). The critical inquiry is whether the defendant's "will has

been overborne and his capacity for self-determination critically impaired." 412 U.S. at 225, Quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961). The court should consider such criteria as the accused's youth, lack of education, low intelligence, lack of advice concerning his constitutional rights, length of detention, persistence of questioning, and deprivation of food or sleep. Schneckloth, supra, 412 U.S. at 226. See also Johnson v. Maryland, 425 F. Supp.538 (D. Md. 1976). In addition, the court should evaluate the psychological effect of such circumstances on the particular defendant. 412 U.S. at 226.

At the time of his arrest, Union was twenty-eight years old. The court does not believe that someone of that age is particularly susceptible to being overborne because of his youth. Nor does the defendant's education indicate special vulnerability: he attended college, graduate school and a semester of medical school. It goes without saying that his level of intelligence is

high. When Union signed the waiver, he had been adequately advised of his rights, and had been in custody approximately an hour and a quarter, not a very lengthy time. Although the defendant claims he was denied access to water, the telephone and toilet facilities, he does not contend he was deprived of food or sleep. His discomfort does not seem to have been so great as to have interfered with his free will.

The essence of Union's argument is that the police used improper psychological pressure to induce his waiver of rights and his confession. As examples, Union points to the police conversing among themselves, for his benefit, about the advantages of cooperation; Agent Keller's falsely telling him the powder found in Union's wallet was "China White" heroin; Keller's showing him a long list of charges to be brought against him; Keller's promises of assistance in bail arrangements if Union cooperated; the searches of Union's car and motel room to which he

consented, allegedly after veiled threats that both would be searched anyway; and Keller's informing him of what the searches uncovered.

Even assuming the defendant's account of his detention is accurate, the circumstances do not, in the court's view, imply that Union's waiver of rights and subsequent statements were involuntary. He testified at the hearing that he signed the waiver form freely and voluntarily, with no force or threat of force from the police. (Tr. at 111-12). He also stated that he signed it because he thought it would help him and would shorten his time in custody, not because he feared any reprisals from the police. Union had had a chance to calm down since his arrest and evaluate his position; there is no evidence that any "mental coercion" by the authorities was so great as to overbear the defendant's free exercise of his will. See Brady v. United States, 397 U.S. 742, 750 (1970). The totality of the circumstances indicates that the defendant

"voluntarily, knowingly and intelligently" waived his Miranda rights and made statements to the authorities, without any critical impairment of his capacity for self-determination. See Miranda, supra, 384 U.S. at 444; Johnson v. Maryland, supra, 425 F. Supp. 545-46.

Because Union was not adequately informed of his Miranda rights until he initialed the "Explanation of Rights" form at 12:25 a.m. on March 15, 1979, none of his statements made between his arrest and 12:25 may be used against him at trial. Miranda, supra, 384 U.S. at 444. Because his waiver of those rights once he was properly advised of them was voluntary and his decision to cooperate uncoerced, any statements he made subsequent to 12:25 a.m. are admissible.

Accordingly, for all the foregoing reasons, it is this 17th day of April, 1980, by the United States District Court for the District of Maryland,

ORDERED:

(1) that the defendant's motion to suppress and exclude confession be, and the same hereby is, Granted in Part and Denied in Part; and

(2) that the Clerk of the Court mail a copy of the Memorandum and Order to each of the parties.

UNITED STATES DISTRICT JUDGE

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-5107

UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT DAVID UNION,

Appellant.

Appeal from the United States District Court for the District of Maryland at Baltimore. Herbert F. Murray, Judge.

Argued: April 9, 1981

Decided: May 11, 1981

Before BRYAN, Senior Circuit Judge, RUSSELL, Circuit Judge and HALL, Circuit Judge.

Gerald A. Kroop (Barry J. Diamond on brief) for Appellant; Steven A. Allen, Assistant United States Attorney (Russell T. Baker, Jr., United States Attorney on brief) for Appellee

PER CURIAM:

Upon the parties' stipulation of the facts and with a jury waived, the District Court of Maryland on April 21, 1980, under an indictment for distributing heroin and aiding and abetting therein. 21 U.S.C. Section 841 (a)(1) and 18 U.S.C. Section 2. In his Memorandum and Order of April 17, 1980, granting in part and denying in part the accused's motion to suppress and exclude his confession,* the District Judge exhaustively recounted the facts and the incidents of the arrest, search and questioning of Union,

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* Certain of appellant's statements were excluded because they followed inadequate Miranda warnings. See Miranda v. Arizona, 384 U.S. 436 (1966). Appellant argues that these statements were sufficiently incriminating to render ineffective the complete set of warnings that preceded his later confession. Although the District Judge did not address this argument specifically in his Memorandum, by appellant's own account the earlier statements concerned the activities of others and did not directly implicate or incriminate appellant; the record reveals that neither the excluded statements nor any incident of the arrest and detention vitiated the voluntariness of appellant's confession.

as well as the contitutent facts upon which the Court's judgment of the conviction was passed.

On this appeal we perceive no insufficiency of proof or error of law at trial, and accordingly affirm the conviction of Union. United States of America v. Robert Union, No. 80-00051 (D.Md., June 18, 1980).

Affirmed

UNITED STATES CODE

Title 21 U.S.C. 841 (a)(1)

(a) Unlawful acts

Except as authorized by this sub-chapter, it shall be unlawful for any person knowingly or intentionally -

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense controlled substances.

Title 18 U.S.C. 2

Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or thing to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a

witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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(5/79)

United States District Court

for the District of Maryland

United States of America vs.

DEFENDANT: ROBERT DAVID UNION

Defendant No. 1

DOCKET NO. ▶ RH-90-00091

JUDGMENT AND PROBATION ORDER

COUNSEL

In the presence of the attorney for the government, the defendant appeared in person on this date ▶ JUNE 18, 1990

☐ WITHOUT COUNSEL However, the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL David A. Irwin, Esq. (Retd.)
(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea. ☐ NOLO CONTENDERE. ☐ NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of COUNT

☐ NOT GUILTY. Defendant is discharged

☒ GUILTY, as to Count No. 1.

Defendant has been convicted as charged of the offense(s) of (Count No. 1) U.S.C., Title 21, Section 841(a)(1) - Unlawfully distribute a Schedule I, NDCS, Narcin and U.S.C., Title 18, Section 2 - Aiding and Abetting.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why sentence should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that he/she be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Four (4) Years.

IT IS FURTHER ADJUDGED that a special parole term of Five (5) Years is imposed in addition to sentence of imprisonment.

SPECIAL CONDITIONS OF PROBATION

Best Copy Available

ADDITIONAL CONDITIONS OF PROBATION

[redacted]

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends

I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY OF THE ORIGINAL

THIS DATE

SIGNED BY

☐ U.S. District Judge

☐ U.S. Magistrate

HERBERT F. MURRAY

HERBERT F. MURRAY

June 18, 1990

DEPUTY CLERK

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